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No. 04-1324

IN THE

Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL
DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

STEPHEN B. KINNAIRD
Counsel of Record
SIDLEY AUSTIN BROWN &
WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JOSHUA J. WESTERHOLM
SIDLEY AUSTIN BROWN &
WOOD LLP
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Amicus Curiae

QUESTION PRESENTED

Does the State waive the one-year limitations period of 28 U.S.C. § 2244(d) by failing to plead it in an answer or otherwise raise it in a federal district court?

Does a federal district court have the power under Rule 4 of the Federal Rules Governing Section 2254 Cases to dismiss a habeas petition *sua sponte* on grounds of untimeliness after it has ordered a response from the State and the State has conceded timeliness?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	2
ARGUMENT	4
I. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF RULE 4	4
A. Habeas Rule 4 Confers on a District Court the Authority to Dismiss a Petition *Sua Sponte* Only Before the State Files a Response	4
B. District Courts Lack the Power to Apply Limitations Defenses Under Rule 4 Because Determinations That Relief Is Foreclosed Cannot Be Made From the Face of the Petition	8
II. THE WAIVER RULES THAT APPLY TO AFFIRMATIVE DEFENSES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD APPLY TO THE AEDPA STATUTE OF LIMITATIONS	11
III. THE ELEVENTH CIRCUIT'S RULING THAT DISTRICT COURTS SHALL *SUA SPONTE* APPLY AFFIRMATIVE DEFENSES NOT RAISED BY THE STATE IS CONTRARY TO THE ADVERSARIAL SYSTEM OF JUSTICE	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES — Page

Acosta v. *Artuz*, 221 F.3d 117 (2d Cir. 2000) 8, 10, 11, 17

Allen v. *Calderon*, No. 02-6917, 2005 WL 271222 (9th Cir. Feb. 3, 2005)..... 13

Banks v. *Dretke*, 540 U.S. 668 (2004)..... 13

Bleitner v. *Welborn*, 15 F.3d 652 (7th Cir. 1994) 13

Browder v. *Department of Corrs.*, 434 U.S. 257 (1978)..... 13, 16

Caldwell v. *Dretke*, Nos. 03-40927 et al., 2005 WL 2766688 (5th Cir. Oct. 26, 2005)..... 13

Capone v. *Aderhold*, 2 F. Supp. 280 (N.D. Ga.), *aff'd*, 65 F.2d 130 (5th Cir. 1933)..... 16

Davis v. *Johnson*, 158 F.3d 806 (5th Cir. 1998) 12

Day v. *Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012 (11th Cir. 1997)..... 14

EEOC v. *White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989)..... 14

Esslinger v. *Davis*, 44 F.3d 1515 (11th Cir. 1995) 19

Expertise, Inc. v. *Aetna Fin. Co.*, 810 F.2d 968 (10th Cir. 1987)..... 14

Hardiman v. *Reynolds*, 971 F.2d 500 (10th Cir. 1992) 17

Harris v. *Nelson*, 394 U.S. 286 (1969) 17, 18

Haskell v. *Washington Township*, 864 F.2d 1266 (6th Cir. 1988)..... 19

Herbst v. *Cook*, 260 F.3d 1039 (9th Cir. 2001)..... 8

Hill v. *Braxton*, 277 F.3d 701 (4th Cir. 2002)..... 8, 12

TABLE OF AUTHORITIES – continued

Page

Jackson v. *Secretary for Dep't of Corrs.*, 292 F.3d 1347 (11th Cir. 2002) 12

Jeffries v. *Lillard*, 27 F.2d 230 (6th Cir. 1928) 16

Johnson v. *United States*, 13 F. Cas. 867 (C.C.D. Mich. 1842) (No. 7418) 16

Kiser v. *Johnson*, 163 F.3d 326 (5th Cir. 1999) 8, 12

Libby v. *Magnusson*, 177 F.3d 43 (1st Cir. 1999) 13

Long v. *Wilson*, 393 F.3d 390 (3rd Cir. 2004) 13

McDermott Int'l, Inc. v. *Wilander*, 498 U.S. 337 (1991) 11

McDonnell v. *Estelle*, 666 F.2d 246 (5th Cir. 1982) 12

Metts v. *Miller*, 995 F. Supp. 283 (E.D.N.Y. 1997) 13

Morissette v. *United States*, 342 U.S. 246 (1952) 12

NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 11

Nardi v. *Stewart*, 354 F.3d 1134 (9th Cir. 2004) 8, 12, 15

Pliler v. *Ford*, 542 U.S. 225 (2004) 2, 10

Powell v. *United States*, 206 F. 400 (6th Cir. 1913) 17

Republican Party v. *White*, 536 U.S. 765 (2002) 18

Robinson v. *Johnson*, 313 F.3d 128 (3d Cir. 2002), *cert. denied*, 540 U.S. 826 (2003) 15

Scott v. *Collins*, 286 F.3d 923 (6th Cir. 2002) 7, 14, 19, 20

Slack v. *McDaniel*, 529 U.S. 473 (2000) 2

TABLE OF AUTHORITIES – continued

Page

Steed v. *Head*, 219 F.3d 1298 (11th Cir. 2000)..... 10

Stephens v. *Kemp*, 469 U.S. 1043 (1984)..... 13

Stewart v. *Martinez-Villareal*, 523 U.S. 637 (1998)..... 2

Strickland v. *Washington*, 466 U.S. 668 (1984)..... 18

Trest v. *Cain*, 522 U.S. 87 (1997)..... 19

United States v. *Burke*, 504 U.S. 229 (1992)..... 17

United States v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976)..... 16

United States v. *Wells*, 519 U.S. 482 (1997)..... 16

United States ex rel. Galvan v. *Gilmore*, 997 F. Supp. 1019 (N.D. Ill. 1998)..... 14

Walker v. *True*, 399 F.3d 315 (4th Cir. 2005)..... 13

Whitaker v. *Meachum*, 123 F.3d 714 (2d Cir. 1997)..... 13

Williams v. *Clarke*, 82 F.3d 270 (8th Cir. 1996)..... 13

Wilson v. *Beard*, 426 F.3d 653 (3rd Cir. 2005)..... 12, 13

Wisconsin Dep't of Corrs. v. *Schacht*, 524 U.S. 381 (1998)..... 17

Woodford v. *Garceau*, 538 U.S. 202 (2003)..... 13

Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982)..... 14

STATUTES

28 U.S.C. § 2101(c)..... 11

28 U.S.C. § 2244(d)(1)..... 3,9

TABLE OF AUTHORITIES – continued

Page

28 U.S.C. § 2254(b)(3) 15

RULES

Fed. R. Civ. P. 8(c) 14

Fed. R. Civ. P. 12(b) 14

Fed. R. Civ. P. 81(a)(2) 16

Fed. R. Governing Section 2254 Cases 3 ..... 4, 5

Fed. R. Governing Section 2254 Cases 4 ..... 5, 6, 8

Fed. R. Governing Section 2254 Cases 4 adv. comm. note 5, 6, 7

Fed. R. Governing Section 2254 Cases 11 12

SCHOLARLY AUTHORITIES

M. Hale, *History and Analysis of the Common Law of England* (1713) 18

5 Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1990) 14

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that

[1] Both Petitioner and Respondent have consented in writing to the filing of this brief, and each party's letter of consent has been filed with the Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus, including cases raising issues similar to the one presented here. See, *e.g.*, *Pliler* v. *Ford*, 542 U.S. 255 (2004); *Slack* v. *McDaniel*, 529 U.S. 473 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998).

Vast numbers of habeas corpus petitions filed in the federal courts are affected by the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the rules governing pleading, waiver, and the *sua sponte* dismissal power of the federal district courts under the Federal Rules Governing Section 2254 Cases. The issues in this case thus directly implicate the interests of NACDL's members and their clients.

INTRODUCTION

In the decision below, the United States Court of Appeals for the Eleventh Circuit authorized a federal district court to dismiss *sua sponte* a petition for habeas corpus as untimely under the AEDPA statute of limitations – even after the State had filed an answer in which it did not plead the statute of limitations, and even though the State had conceded the timeliness of the petition. Pet. App. 6a. According to the Eleventh Circuit, Rule 4 of the Federal Rules Governing

Section 2254 Cases ("Habeas Rules") "'differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses,'" and justified the district court in *sua sponte* dismissing the habeas petition in this case. *Id.* at 5a. This ruling is flatly irreconcilable with the plain language, structure, and purpose of the Habeas Rules. There is simply no foundation for the remarkable ruling of the Eleventh Circuit that the Habeas Rules adopted by this Court dispense with the traditional adversarial process and enjoin federal district courts *sua sponte* to invoke affirmative defenses on behalf of the State that the State itself does not assert.

The decision below runs roughshod over the express limitations on the district court's powers in Habeas Rule 4. Rule 4 permits *sua sponte* dismissals only *prior* to the ordering of an answer by the district court; only if the prisoner is not "entitled" to relief, which forecloses district court determination of any waivable defense; and only if the lack of entitlement is "plainly" apparent from the "face" of the petition and annexed exhibits, which categorically forecloses determination of any affirmative defenses (like limitations defenses) that cannot be determined strictly from the petition or annexed court records. Because the time limits of the AEDPA, 28 U.S.C. § 2244(d)(1)(A), are not jurisdictional, any affirmative defense based on the statute must be asserted in the State's answer or else it is waived.

Beyond the prohibition on such *sua sponte* dismissals found in the plain language of Rule 4, it is simply impossible to determine from the face of a habeas petition that it is untimely. The date of the decision from which timeliness is calculated is subject to tolling and other factors found in the Habeas Rules, none of which are evident from the face of the petition. To dismiss a petition for untimeliness without a show-cause order is to ignore these factors and to deny the petitioner notice and the opportunity to be fairly heard.

Finally, allowing a court to raise *sua sponte* an affirmative defense that has been waived by the state has deeply troubling results. It frustrates congressional intent to create a limitations defense, which Congress necessarily understood to be waivable. Furthermore, to give courts the power to cure the state's waiver of an affirmative defense is to erode the adversarial process, uniquely compromising in the habeas context the status of the federal judge as neutral decisionmaker.

ARGUMENT

I. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF RULE 4.

A. Habeas Rule 4 Confers on a District Court the Authority to Dismiss a Petition *Sua Sponte* Only Before the State Files a Response.

Habeas Rule 4 confers upon the federal district court a limited power to dismiss facially invalid petitions only *prior* to the effective commencement of adversarial proceedings with the State. That authority expires when adversarial proceedings begin – indeed, with any required *service* of the petition upon the State.

The Habeas Rules must be understood as a unitary whole providing for an orderly sequence of events. Rule 1 defines the applicability of the Habeas Rules. Rule 2 defines the persons eligible to petition for relief and the requisite form and content of a petition. Rule 3 then provides that the original and two copies of the petition should be filed with the clerk of the district court, who, having ascertained that the petition meets the requirements of Rules 2 and 3, "shall file the petition and enter it on the docket." Habeas R. 3. The habeas petitioner is not obliged to serve the petition upon the respondent contemporaneously with filing, and "[t]he filing of the petition shall not require the respondent to answer the

petition or otherwise move with respect to it unless so ordered by the court." *Id.* Indeed, Rule 4 makes plain that service of the petition upon the respondent occurs only after preliminary consideration of the petition by a district judge. Rule 4 provides:

> **Rule 4. Preliminary Consideration by Judge**
>
> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general ....

Habeas R. 4;[2] see also *id.* adv. comm. note (noting that rule of mandatory service of petition regardless of whether an answer is ordered departs from prior practice, where "the respondent often d[id] not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 2243").

Rule 4 thus authorizes the district courts to conduct a "preliminary" (*i.e.*, pre-service) screening of habeas petitions

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[2] The quoted language of the Rule is from the version in force at the time of the lower courts' decisions. The rule was amended effective December 1, 2004. According to the Advisory Committee notes, no substantive change was intended regarding the quoted portion of the rule.

and then to dismiss summarily any facially invalid petition prior to service. As the Advisory Committee stated, Rule 4 reflects the pre-existing duty under 28 U.S.C. § 2243 "to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen* v. *Perini*, 424 F.2d 134, 141 (6th Cir. 1970)." Habeas R. 4 adv. comm. note.

Contrary to the Eleventh Circuit's tortured reading, the language of Rule 4 does not allow for an inquisitorial power of the district court that continues even after the filing of the State's answer, much less a power to *sua sponte* adjudicate affirmative defenses of the State that the State has not asserted (and has even disavowed). To the contrary, Rule 4 expressly declares that the power to order summary dismissals exists only *before* the district court orders an answer or other pleading.

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal.... *Otherwise* the judge shall order the respondent to file an answer ....

Habeas Rule 4 (emphasis added). "Otherwise" is used disjunctively here: a court may *either* make an order for dismissal *or* order an answer. Once an answer is ordered, no further capacity to dismiss the petition apart from the respondent's motion is contemplated, as the Advisory Committee Notes to Habeas Rule 4 confirm:

> If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. *If summary dismissal is not ordered, the judge must order the respondent to file an answer or to*

> *otherwise plead to the petition* within a time period to be fixed in the order.

Habeas R. 4 adv. comm. note. Thus, under Rule 4, the examination stage ends and the pleading stage begins once the judge determines that the face of the petition and any exhibits do not "plainly appear" to show that the petitioner is not entitled to relief, and that summary dismissal is therefore inappropriate.

The sequential structure of the Habeas Rules underscores the self-evident meaning of Rule 4. Once an answer is ordered and the petition is served pursuant to Rule 4, Rule 5 defines the content of the answer; Rule 6 and Rule 7 govern discovery and expansion of the record; and Rule 8 governs evidentiary hearings. Contrary to the Eleventh Circuit's holding, the summary dismissal power that is specific to the preliminary examination of the petition in Rule 4 simply does not authorize the magistrate judge's *sua sponte* show-cause proceeding and dismissal order more than a year after the State filed its answer, well after the pleading stage has begun.

According to the plain text of the Habeas Rules, the right to dismiss the petition *sua sponte* comes *before* the respondent is ordered to make an answer and not after. As the Sixth Circuit has stated:

> Significantly, Rule 4 does not give a court continuing power to dismiss *sua sponte* the case after the court orders respondent to file an answer. In short, Rule 4 gives a district court the ability to dismiss habeas petitions *sua sponte*, but that ability expires when the judge orders a respondent to file an answer or take other appropriate action.

Scott v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002).

Indeed, most circuits are arrayed against the Eleventh Circuit on this point. Other courts of appeals, even among

those that permit *sua sponte* dismissals based on affirmative defenses, have permitted such dismissals after the State has filed an answer that does not raise the defense. See, *e.g.*, *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999); *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004) ("We now conclude that the district court lacks the authority to *sua sponte* dismiss a habeas petition as time-barred after the state files an answer which fails to raise the statute of limitations defense."); *Herbst* v. *Cook*, 260 F.3d 1039, 1042 & n.3 (9th Cir. 2001) (district court has authority to raise the statute of limitations *sua sponte* before the state ever files a response); *Hill* v. *Braxton*, 277 F.3d 701, 707 (4th Cir. 2002) ("Our point is simply that when a federal habeas court, in its discretion, raises an affirmative defense before the state has even entered a responsive pleading, as the district court did here, it acts consistently with Rule 4."); *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (the Habeas Rules "give the district court the power to review and dismiss habeas petitions prior to any responsive pleading by the state"). This Court should vindicate the plain language of Rule 4 and reverse the Eleventh Circuit's aberrant ruling.

B. District Courts Lack the Power to Apply Limitations Defenses Under Rule 4 Because Determinations That Relief Is Foreclosed Cannot Be Made From the Face of the Petition.

Even if the summary dismissal power of Rule 4 could be invoked after the filing of the State's answer, Rule 4 by its plain terms would still forbid invocation of that power to dismiss the petition *sua sponte* for untimeliness under AEDPA.

The Eleventh Circuit (like other courts that permit *sua sponte* dismissals on this ground) has simply disregarded the requirement of Rule 4 that dismissal may only be ordered "[i]f it plainly appears *from the face of the petition and any exhibits annexed to it* that the petitioner *is not entitled* to relief in the district court." Habeas R. 4 (emphasis added). It is

possible that the petition and exhibits on their face may indicate both the date of filing and "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A), and thus allow the district court to determine whether more than one year had elapsed between those two dates. But even if these dates can be ascertained, a district court can *never* conclude from the "face" of the petition and attached exhibits that a petitioner "is not entitled to relief in the district court" because of the statute of limitations, for three independent reasons.

First, the limitations period of section 2244(d)(1)(A) only applies if the date when direct review of the conviction concluded or became unavailable is later than three other dates specified in subsections (d)(1)(B) to (D). The applicability of at least one of those subsections – subsection (d)(1)(B), which sets the commencement date of the limitations period as "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing," *id.* § 2244(d)(1)(B) – was not in this case, and never will be, ascertainable from the face of the petition. A district court would always have to issue an order to show cause why subsection (d)(1)(A) should not apply, because that is the only way to make sure that there was no unlawful impediment to earlier filing created by state action that would trigger the application of (d)(1)(B). However, Rule 4 does not authorize show-cause orders; instead, it only authorizes *sua sponte* dismissal based on the face of the petition. If a district court must issue a show-cause order to ascertain whether facts exist that might prevent dismissal of the action, then by definition it is not determining the petitioner's entitlement to relief solely from "from the face of the petition and any exhibits annexed to it." Accordingly, the district court (or a magistrate judge acting in its stead) will always exceed its authority under Rule 4

because show-cause orders are necessary before dismissal can be ordered. Rule 4 simply cannot be read to grant district courts a power of summary dismissal for statute of limitations violations.

Second, and relatedly, a district court can never determine from the face of the petition that a plaintiff is not entitled to relief by virtue of subsection (d)(1) because the limitation period therein is always *potentially* subject to tolling (a) under the equitable tolling doctrine, *Steed* v. *Head*, 219 F.3d 1298, 1300 (11th Cir. 2000); (b) by agreement of the petitioner and the state; or (c) by operation of the statutory tolling provision of subsection (d)(2). Once again, a district court cannot hold a petition time-barred without giving the parties by show-cause order an opportunity to be heard as to whether there are reasons the limitations period may not apply, such as tolling. It matters not that, in the show-cause proceeding here, the district court rejected petitioner's equitable tolling defense, and that the other two sources of tolling did not apply. See Pet. App. 7a, 13a-14a. The point is that the possibility of tolling can never be excluded simply from the face of the petition, and always necessitates a show-cause proceeding to give the parties an opportunity to be heard. Any such hearing (such as the one conducted by the magistrate judge here) is unauthorized by Rule 4. Rule 4 simply does not permit *sua sponte* determinations of statute of limitations questions.

This is why the Court stated in *Pliler* v. *Ford* that "[D]istrict judges often will not be able to make these calculations [of whether the AEDPA limitations period has run] based solely on the face of habeas petitions." 542 U.S. at 232. Moreover, for reasons similar to the foregoing, the Second Circuit in *Acosta* vacated a district court's judgment because "the courts dismissed without affording the petitioners notice and an opportunity to be heard." *Acosta*, 221 F.3d at 124. Continuing, it held that "[t]he long-standing general rule is that a court may not dismiss an action without

providing the adversely affected party with notice and an opportunity to be heard." *Id.* Simply put, to dismiss *sua sponte* a petition for untimeliness does not afford petitioner notice and an opportunity to be heard.

Third, even if the foregoing hurdles could be overcome, a district court can only conclude that the petitioner "is not entitled to relief" within the meaning of Rule 4 if application of the statute of limitations in section 2244(d)(1) is mandatory (*i.e.*, is not waiveable). As discussed in the following section, there is simply no basis in AEDPA or the federal rules for holding a statute of limitations defense nonwaiveable.

II. THE WAIVER RULES THAT APPLY TO AFFIRMATIVE DEFENSES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD APPLY TO THE AEDPA STATUTE OF LIMITATIONS.

As an initial matter, a filing period that is not waiveable is effectively jurisdictional. Congress knows how to create a mandatory jurisdictional filing period, such as the requirement that petitions for certiorari to this Court in civil cases shall be filed within 90 days of entry of judgment. See 28 U.S.C. § 2101(c). In the AEDPA, however, Congress chose to enact "[a] 1-year period of limitation" in section 2244(d)(1). When Congress uses a term of art, such as "period of limitation," it is presumed to intend that specific meaning. In the words of *NLRB* v. *Amax Coal Co.*:

> Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.

453 U.S. 322, 329 (1981). See also *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("[W]e assume that when

a statute uses [a term of art], Congress intended it to have its established meaning"); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art ... it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

Section 2244(d)(1) is a statute of limitations, and there is no dispute that this statute, like any other statute of limitations, grants an affirmative defense. See *Jackson* v. *Secretary for Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) ("the statute of limitations is an affirmative defense"). See also Pet. App. 4a; *Nardi*, 354 F.3d at 1140 ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Hill*, 277 F.3d at 705 ("We conclude that the one-year limitation period contained in § 2244(d) is an affirmative defense that the state bears the burden of asserting."); *Davis* v. *Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *Acosta*, 221 F.3d at 122 ("The AEDPA statute of limitation is ... an affirmative defense ...."); *Wilson* v. *Beard*, 426 F.3d 653, 664 (3rd Cir. 2005) ("given that the [AEDPA] statute of limitations is an affirmative defense").

Because the Habeas Rules do not address affirmative defenses directly, AEDPA's limitations defense is governed by the Federal Rules of Civil Procedure. Habeas Rule 11 states: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." As the Fifth Ciruit has stated, "[w]hen [the Habeas Rules] are otherwise silent, Rule 11 compels us to follow the Federal Rules of Civil Procedure in disposing of habeas corpus petitions." *McDonnell* v. *Estelle*, 666 F.2d 246, 249 (5th Cir. 1982); see also *Kiser*, 163 F.3d at 328-29. There is overwhelming support across the federal courts, both before and after the implementation of the AEDPA, for applying the Federal Rules of Civil Procedure to matters of procedure not

directly addressed by the Habeas Rules. See *Banks* v. *Dretke*, 540 U.S. 668, 687 (2004) (applying Rule 15(b) amendments to habeas pleadings); *Whitaker* v. *Meachum*, 123 F.3d 714, 715-16 & n.2 (2d Cir. 1997) (per curiam) (applying FRCP motions for summary judgment to habeas context); *Bleitner* v. *Welborn*, 15 F.3d 652, 654 (7th Cir. 1994) (judge has FRCP rule 6(b)(2) discretion to extend motion-filing deadlines in habeas cases); *Walker* v. *True*, 399 F.3d 315, 319 & n.1 (4th Cir. 2005) (applying motion to dismiss in habeas context); *Allen* v. *Calderon*, No. 02-6917, 2005 WL 271222, at *2 (9th Cir. Feb. 3, 2005) (applying appointment of guardian ad litem under FRCP Rule 17(c) to habeas context); *Williams* v. *Clarke*, 82 F.3d 270, 272-73 (8th Cir. 1996) (applying Rule 41(a)(1) voluntary dismissal to habeas context despite concerns of prisoners using it as a stalling tactic); *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) (Rule 3 is applicable in the habeas context because nothing in the Habeas Rules contradicts it); *Browder* v. *Department of Corrs.*, 434 U.S. 257, 269-70 (1978) (applying Rules 1, 52(b), and 59); *Stephens* v. *Kemp*, 469 U.S. 1043, 1057 (1984) (applying Rules 12(c) and 56 in the habeas context); *Wilson*, 426 F.3d at 662 (applying Rules 6(a) and 6(e) to the AEDPA limitations period); *Caldwell* v. *Dretke*, Nos. 03-40927 et al., 2005 WL 2766688, at *4 (5th Cir. Oct. 26, 2005) (applying the definition of "judgment" found in Rule 54 to the AEDPA limitations period); *Libby* v. *Magnusson*, 177 F.3d 43, 49 (1st Cir. 1999) (Rule 8(c) "functions much the same way in habeas corpus jurisprudence"); *Long* v. *Wilson*, 393 F.3d 390, 400-01 (3rd Cir. 2004) (applying Rules 8 and 15(a) to the habeas context under the AEDPA); *Metts* v. *Miller*, 995 F.Supp. 283, 291 & n.13 (E.D.N.Y. 1997) (applying Rule 8(c) to determine that limitations is an affirmative defense, waived if not raised by the state).

Under the Federal Rules of Civil Procedure, statutes of limitations are waiveable. Rules 8(c) and 12(b) require that parties raise affirmative defenses in their first responsive

pleadings. Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ... and any other matter constituting an affirmative defense."); *id.* 12(b) ("[e]very defense ... shall be asserted in the responsive pleading," except certain specified defenses (not including statute of limitations) that may be raised by motion).

Under the Federal Rules, the consequence of not pleading the statute of limitations is the waiver of that affirmative defense. A limitations defense "is generally waived unless it is raised in the defendant's responsive pleading." *Expertise, Inc.* v. *Aetna Fin. Co.*, 810 F.2d 968, 973 (10th Cir. 1987); see also 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 477 (2d ed. 1990) ("Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case."); *EEOC* v. *White & Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989) ("'[t]he hornbook law is that affirmative defenses must be specifically pled'.... [t]he court did not abuse its discretion in ruling that appellant had waived its affirmative defenses" by not pleading them before pre-trial); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("a statute of limitations is subject to waiver" if not timely raised).

The same rule has traditionally applied in the habeas context. Hence, in filing an answer under Habeas Rule 5, the State is obliged to plead the limitations defense or else it is waived. See *Day* v. *Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) (per curiam) ("The statute of limitations is an affirmative defense which must be specifically pled. This court has held in a number of discrimination actions that failure to plead the bar of the statute of limitations constitutes a waiver of the defense.") (citation omitted); *Scott*, 286 F.3d at 928 ("[T]he statute of limitations in § 2244(d) is an affirmative defense that must be pleaded to avoid waiver."); *United States ex rel. Galvan* v.

Gilmore, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998) ("since § 2244(d) does not affect this court's subject matter jurisdiction over habeas petitions, the state can waive the § 2244(d) timeliness issue by failing to raise it") (citations omitted); *Robinson* v. *Johnson*, 313 F.3d 128, 134-37 (3d Cir. 2002) (sur panel reh'g) (holding that a state can waive the statute of limitations under the AEDPA "if not pleaded in the answer ... [or] raised at the earliest practicable moment thereafter"), *cert. denied*, 540 U.S. 826 (2003); *Nardi*, 354 F.3d at 1141 ("We agree with the Third and Sixth Circuits that the state waives its statute of limitations defense by filing a responsive pleading that fails to affirmatively set forth the defense.").

Nothing in AEDPA alters the ordinary rule that a statute of limitations affirmative defense is deemed waived if not pleaded. Indeed, AEDPA strongly supports the contrary inference that the limitations defense of section 2244(d)(1) is waiveable. For a separate defense of failure to exhaust state remedies, Congress expressly provided that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Had Congress wished to require the express waiver of the limitations defense, or otherwise limit ordinary application of waiver doctrine, it could easily have included a similar provision for limitations defenses in this or another section.

It did not do so. Moreover, Congress's prohibition in section 2254 of implied waiver of exhaustion requirements indicates that Congress accepted the general principle that other affirmative defenses could be impliedly waived. The ruling below permitting *sua sponte* dismissal of habeas petitions on statute of limitations grounds, even when the State has failed to raise the defense in its answer, effectively abrogates the waiver doctrine. That ruling has no warrant in the Habeas Rules or AEDPA.

Given that Federal Rule of Civil Procedure 8 applies by force of Federal Rule 81(a)(2) and Habeas Rule 11, it would be inappropriate to infer a new and contravening rule of law from congressional silence on a subject. This Court has "'frequently cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."'" *United States* v. *Wells*, 519 U.S. 482, 496 (1997) (alteration in original) (quoting *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 129-30 (1971) (quoting *Girourard* v. *United States*, 328 U.S. 61, 69 (1946))). It is "a cardinal principle of statuory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). This principle "carries special weight when [the Court is] urged to find that a specific statute has been repealed by a more general one." *Id.* at 169. This principle is directly contradicted by the district court's inference that the specific rule of law long established by the Federal Rules of Civil Procedure relating to the treatment of affimative defenses is overturned by the Habeas Rules, or by the AEDPA, which do not directly address the point.[3]

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[3] The permissive character of Habeas Rule 11, which provides that "the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or these rules," does not justify the district court's action in this case. First, while Habeas Rule 11 gives the district court discretion to apply any Federal Rule of Civil Procedure in a habeas case, Federal Rule of Civil Procedure 81(a)(2) makes the Federal Rules of Civil Procedure *mandatorily* applicable to habeas cases in two conditions are met: (1) they do not conflict with the habeas statutes and the rules, and (2) habeas practice conformed to those rules prior to their adoption. Fed. R. Civ. P. 81(a)(2). Habeas practice prior to the adoption of the Federal Rules of Civil Procedure conformed to the Federal Rule of Civil Procedure 8's rules regarding pleading and waiver of affirmative defenses. *Browder*, 434 U.S. at 270; *Capone* v. *Aderhold*, 2 F. Supp. 280, 282 (N.D. Ga.) ("an affirmative defense ... must be pleaded or be deemed to be waived"), *aff'd*, 65 F.2d 130 (5th Cir. 1933); *Johnson* v. *United States*, 13 F. Cas. 867, 868 (C.C.D. Mich. 1842) (No. 7418) ("By failing to set up the defence, the defendant waived it."). *See also Jeffries*

III. THE ELEVENTH CIRCUIT'S RULING THAT DISTRICT COURTS SHALL *SUA SPONTE* APPLY AFFIRMATIVE DEFENSES NOT RAISED BY THE STATE IS CONTRARY TO THE ADVERSARIAL SYSTEM OF JUSTICE.

The Eleventh Circuit has developed a theory that a district court is charged not only with the conventional task of determinining the facial validity of the claims stated in the petition (which Rule 4 does require), but also with conceiving and applying affirmative defenses that the State has not asserted. Any such notion is inimical to the adversarial process. "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *Hardiman* v. *Reynolds*, 971 F.2d 500, 502 (10th Cir.1992); *Acosta*, 221 F.3d at 122.

That the State should suffer the adverse effects of failing to argue a necessary point is nothing new; no exception is made for the State, which under an adversarial system is compelled as the defendant to raise points of argument or to lose their benefit. See, *e.g.*, *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998) (state waives its sovereign immunity defense if it fails to raise it).

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v. *Lillard*, 27 F.2d 230 (6th Cir. 1928); *Powell* v. *United States*, 206 F. 400 (6th Cir. 1913).

Second, the discretion to depart from the Federal Rules is not unbounded, and may only be exercised "in promoting the ends of justice," Habeas Rule 11 adv. comm. note, where alternative modes of procedure are more "appropriate" in the habeas context, *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969). A general rule relieving the warden of pleading affirmative defenses, including limitations defenses, would not be a more appropriate procedure in habeas cases.

Therefore, assigning the district court the function of conceiving and applying affirmative defenses that the State does not assert compromises the status of the federal judge as neutral decisionmaker. It would be particularly strange to thrust a federal judge into that unfamiliar role in the special context of habeas corpus litigation, which is intended to be solicitous of the interests of the habeas petitioner:

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

Harris v. *Nelson*, 394 U.S. 286, 292 (1969).

Moreover, the fairness found in the adversarial court system is an essential part of proper proceedings in our legal system. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 696 (1984); see also *Republican Party* v. *White*, 536 U.S. 765, 801 (2002) (Stevens, J., dissenting) ("it is the ability ... to reevaluate [legal theories] in the light of an adversarial presentation, and to apply the governing rule of law even when inconsistent with those views, that characterize judicial openmindedness."); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (the adversarial process "beats and bolts out the Truth much better").

AEDPA suffers not in the least if the district courts are denied these extraordinary powers; the ability to avoid unneeded evidentiary hearings in federal habeas cases is well preserved by the court's initial ability to dismiss a habeas

petition during the examination stage. As the Sixth Circuit maintained, "the interests [of comity, finality, and federalism] are well preserved in light of a district court's continued ability to dismiss *sua sponte* a habeas petition as an initial matter." *Scott*, 286 F.3d at 930 n.10.

This Court has elsewhere criticized *sua sponte* dismissals, including in the habeas context, based on the notion that the most efficient way to resolve disputes is through briefing and argument by both parties. See *Trest* v. *Cain*, 522 U.S. 87, 92 (1997). Indeed, *sua sponte* dismissals to cure waiver harm the adversarial process by undermining the accountability of the State for its own defenses. "A district court's ability to dismiss a habeas petition *sua sponte* as an initial matter ... does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense." *Scott*, 286 F.3d at 930; see also *Haskell* v. *Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [the statute of limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning.") (citations omitted); *Esslinger* v. *Davis*, 44 F.3d 1515, 1527 (11th Cir. 1995) (reversing a *sua sponte* dismissal of a habeas petition after the state had waived an affirmative defense because "[t]he court's *sua sponte* invocation of the procedural default to bar relief, despite the State's waiver, served no important federal interest"). The adversarial system of justice demands that the State be the master of its defenses and and bear the consequences of its failure to plead all affirmative defenses.

Finally, while a State's failure to assert a limitations defense will often be inadvertent, there may also be situations in which a State consciously decides against asserting the defense. A State may decide, for instance, that its obligations of fairness and its interest in preserving the integrity of its criminal proceedings outweigh, in a particular case, its interst in finality. For example, if there is severe police or prose-

cutorial misconduct, a flagrant violation of constitutional rights, or a high probability that the petitioner is innocent, the State may in the interest of justice decline to assert an available limitations defense. Or the State for strategic reasons may decide that it would not wish to have a court rule on contested limitations issues in a particular case. The Eleventh Circuit's ruling, despite cloaking its holding in the mantle of federalism, strips the State of its prerogative to determine which defenses to assert, in favor of a wooden mandatory command that the district court "shall make an order for ... summary dismissal" whenever it determines that a statute of limitations defense may lie. Nothing in AEDPA, the Habeas Rules, or principles of federalism and comity compels this result.

Nor can respondent rely on principles of comity, finality, and federalism to explain not the permissibility of *sua sponte* dismissals under the language of the habeas rules, but the reasons why courts desire such permission. As *Scott* held, however, "the interests [of comity, finality, and federalism] are well preserved in light of a district court's continued ability to dismiss *sua sponte* a habeas petition as an initial matter." *Scott*, 286 F.3d at 930 n.10. The habeas rules provide an examination stage for this very reason: judicial economy and federalism are "well preserved" by an ability to dismiss a habeas petition before the pleading stage begins.

Accordingly, even if the plain text of Habeas Rule 4 were ambiguous (which it is not), there is no reason to authorize a district court to dismiss a habeas petition *sua sponte* for procedural reasons once the pleading stage had begun. Indeed, the policies inherent in the adversarial habeas system compel the opposite result, and should have prevented the court below from dismissing Day's petition.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

STEPHEN B. KINNAIRD
Counsel of Record
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JOSHUA J. WESTERHOLM
SIDLEY AUSTIN BROWN & WOOD LLP
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Amicus Curiae

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